Filed 2/6/03 August v. Podell CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GEORGE AUGUST, Plaintiff and Appellant, v. CARY PAUL PODELL et al., Defendants, Cross-Complainants and Appellants.	G027545 (Super. Ct. No. 783622) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David H. Brickner, Judge. Affirmed.

Roberts & Associates, Clifford W. Roberts, Jr., and Kent J. Kinosian for Plaintiff and Appellant.

Law Offices of Jeffrey D. Pearlman and Jeffrey D. Pearlman; and Wayne E. Thompson for Defendants, Cross-Complainants and Appellants.

* * *

Buyer of business sued seller for breach of contract and fraud, and after a jury verdict for seller, appeals claiming lack of substantial evidence. Seller appeals claiming trial judge erred in not awarding attorney fees. We affirm.

I

FACTS[1]

George August (August) decided to buy a business for his son, Louie August. He purchased a smog-testing and automobile repair shop business from Cary Podell (Podell). Actually, it was Podell's father, Asher Podell, who owned the business, known as O.V.H. Independent, Inc., but Podell operated it and conducted the negotiations.

August said his first point of discussion with Podell's broker during negotiations to buy the business was that the business was run by the help. "[It was] kind of a turnkey operation which I figured would be great for me so I could continue to do my own business." He was also attracted because the business was selling for one times its annual net, whereas businesses typically sell for twice that amount. August was so concerned about the low price that he called the State of California to make sure they were not planning on taking over smog control. Before buying the business, August went to the place of business at least eight times. During those trips, he viewed the business from across the street to observe customers coming and going. August also consulted

---

[1] This is not an issue directly raised in the briefs. In testimony Cary Podell said he cheated the government:

"[Counsel]: Have those tax returns accurately and truthfully reflected the results that have been obtained from the operations of O.V.H. Independent?
[Cary Podell]: No.
[Counsel]: So you have filed tax returns, but they've been untruthful tax returns under penalty of perjury, correct?
[Cary Podell]: Yes.
[Counsel]: What you've done is concealed from the government the true amount of income that has been produced so you could not pay taxes; is that right?
[Cary Podell]: Yes."

with his accountant and his business attorney. In addition, there were several meetings between August and Podell during negotiations.

The deal closed October 25, 1996. Podell stayed at the business to train August, but not for long. August "threw him out after the first week of training."

The business was not as profitable as August expected, and he filed suit against Podell, his father, their business, and their brokers for various causes of action, including fraud, on August 28, 1997. A cross-complaint for indemnity was filed, and the brokers settled before trial. Both Podell and his father cross-complained against August for breach of the lease. The jury found no material breach of the lease but returned a general verdict in favor of Podell and his father and against August in the sum of $1. Other than attorney fees, neither side brings any issues in this appeal relating to the cross-complaint.

At trial, Podell testified that during the negotiations he told August, with the intention that August rely on the information, that the business grossed $36,500 per month; that its expenses were $24,000 to $30,000 per month; that it netted $8,000 to $10,000 per month; that the business complied with all laws; that it had a good reputation; and that the business was "all help run."

August claimed he tried to run the business as closely as possible to the way Podell ran it, but the gross was "about 33 in November, and the expenses were somewhere around 31, like 5,000 expenses, like 5,000 above income. Same thing for December." Laura Gonzales, who worked as a bookkeeper for Podell, and stayed on to work for August, said the invoices for April, June and July 1996 were $27,873.55, $26,860.65 and $30,241.35, respectively.

August claims that, while the gross receipts were near what Podell had represented the business expenses were much higher. August's profit over a three-year period was approximately $50,000, $200,000 less than the profit he would have had if the profits were as Podell had represented. Since August, himself, worked at a business that

he expected to be completely run by help, he sought compensation for additional lost profits of $140,000.

A jury returned a verdict on December 10, 1997. On August's complaint, the jury found in favor of Podell and his father and against August. On appeal, August urges the judgment entered on the jury's verdict is not supported by substantial evidence. August concedes it might be argued there exists substantial evidence to support the judgment with regard to most of Podell's representations, and on whether or not August suffered damages based on the difference between the represented and realized profits. But August claims the judgment is plainly not supported by substantial evidence regarding Podell's representation that the business was "all help run," as well as the claimed $140,000 damages he says he suffered as a result.

Podell and his father filed a cross-appeal claiming the trial judge "arbitrarily" refused to award them attorney fees and costs, despite judgment being entered in their favor on both the complaint and cross-complaint. They argue fees should have been awarded under both the sales contract and the lease agreement.

II

DISCUSSION

Substantial evidence

Both stare decisis and the California Constitution encourage appellate courts to affirm, if possible. A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion

that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.)

If there is no substantial evidence to support a judgment, it is erroneous as a matter of law. To determine whether there is substantial evidence, the appellate court properly reviews facts. A verdict will not be disturbed merely because there is a conflict in the evidence. Nor will the evidence be weighed on appeal. Substantial evidence is evidence of ponderable legal significance, reasonable in nature, credible, and of solid value. (*Estate of Teed* (1952) 112 Cal.App.2d 638, 644.) The testimony of a single witness can provide the requisite substantial evidence. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) When two or more inferences reasonably can be drawn from the facts, a reviewing court is without power to substitute its deductions for those of the trier of fact. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874.)

In his trial testimony, Podell freely admitted he told August the business was "all help run," and that he intended August to rely on that representation. On cross-examination he said that he, in fact, worked at the business full time. He claims now that he never stated *in writing* that the business was all help run, and the term was never defined by the parties in any writings, and that there were never any representations to August that management by the owner or his representative was not required. August maintains the important points are "Cary Podell's *own testimony* irrefutably establishes that the representation was false," and August was required to work there ten hours per day Monday through Saturday, plus a half-day on Sunday.

There have been no citations to trial evidence regarding the meaning of the term "all help run," except what August understood the term to mean. August had numerous conversations with both Podell and the brokers, yet none of them concerned the meaning of this term. The mere fact that part of the agreement was that Podell would train August implies that some work would have to be done by the new owner. There are

significant and substantial inferences to be drawn from the evidence to support the jury's verdict. We cannot find a miscarriage of justice under these circumstances.

Attorney fees

Podell claims the trial court erred in not granting attorney fees, since he is entitled to them as a matter of law. A prevailing party, the party with a net monetary recovery or a defendant as against those plaintiffs who do not recover any relief against that defendant, is entitled to recover costs in any action. "When any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be determined by the court." (Code Civ. Proc., § 1032, subd. (a)(4).) Contractual attorney fees are costs. (Code Civ. Proc., § 1033.5, subd. (10)(A).) The party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine there is no party prevailing on the contract. (Civ. Code, § 1717 subd., (b)(1).)

August and the broker signed a Deposit Receipt/Earnest Money Agreement on September 19, 1996. One of the provisions of that document reads as follows: "PURCHASER, SELLER and BROKER hereby agree that in the event any action or suit be commenced to enforce or interpret any of the provisions of this agreement or for any other cause arising out of or in any manner related to the transaction contemplated by this agreement, the prevailing party or parties shall be entitled to recover from the other(s) their reasonable attorney's fees and court costs as determined by the Court in such action or suit." On September 27, 1996, they both signed a lease which contains the following provision: "31. Attorney's Fees. If either party or the broker(s) named herein bring an action to enforce the terms hereof or declare rights hereunder, the prevailing party in any such action, on trial or appeal, shall be entitled to his reasonable attorney's fees to be paid by the losing party as fixed by the court. The provisions of this paragraph shall inure to the benefit of the broker named herein who seeks to enforce a right hereunder."

After the verdict, Podell filed a motion seeking $15,996 for costs and $116,076.22 for attorney fees. The court took the matter under submission and issued the following ruling on May 19, 2000: "The jury expressed its disdain for the parties' cases with its verdict, in light of which this court finds no prevailing party. Therefore, the motion to tax costs is moot, as no costs are recoverable and no attorney's fees shall be awarded to either side."

A trial court's discretion is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. An exercise of discretion is subject to reversal on appeal where no reasonable basis for the action is shown. (*Common Cause v. Stirling* (1983) 147 Cal.App.3d 518, 522.)

Regarding the cross-complaint, the jury specifically found August did not materially breach the lease, and denied Podell the $120,000 in damages he sought in his cross-complaint. Nevertheless, they awarded Podell nominal damages in the amount of $1. We cannot find the court breached its discretion in refusing to award costs under the lease contract.

As to the complaint, the jury was instructed on both contract and tort theories. The trial judge observed the witnesses while the evidence was presented. It is not immediately clear from the bare record just what the crux of the case was. Podell argues the heart of the matter was fraud. Maybe. But it might have been contract, too. As noted above, we agree with Podell the term "all help run" was not defined. Thus, the jury could have been deliberating about whether or not there was a mutual misunderstanding about the meaning of the term, whether or not there was a breach of a term, whether or not there was a misrepresentation of a term, or something else. The trial

judge exercised his discretion. We see no reason to second guess him, since he was in a better position to observe the true core of the matter.

III

DISPOSITION

The judgment is affirmed. Each side shall bear its own costs.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

O'LEARY, J.